No. 91-1270

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.

Appellants

v.

LOUIS TERRAZAS, ET AL.

Appellees

GUADALUPE MENA, MARIA GOMEZ, ZULEMA HERNANDEZ, JUAN ANGEL GARCIA, CHAYO FLORES ZALDIVAR, ROBERTO R. ALONZO, PATRICIA ROYBAL SUTTON, JOSE R. KENNARD, the EL PASO COALITION FOR FAIR REDISTRICTING, AUGUSTIN NEGRETE, BENJAMIN MENCHACA, RICHARD ARRIOLA, SAUL GONZALEZ, and MARC CAMPOS

Intervention-Applicants

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION FOR LEAVE TO INTERVENE

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MOTION FOR LEAVE TO INTERVENE

Thirteen Mexican American individuals from throughout Texas and one community organization that protects voting rights of Mexican Americans in West Texas respectfully ask this Court for leave to intervene as parties in this case, pursuant to Federal Rule of Civil Procedure 24(a).

The Intervention-Applicants (designated as "Minority Applicants" for purposes of this motion) appreciate that they seek a seldom-granted remedy in this Court.

However, they believe the extraordinarily unusual circum-

stances that give rise to their seeking relief in this Court, together with the fact that they have rights vitally affected by this appeal, rights which are not adequately protected or represented by any party to this cause, are imperative enough to request the Court to allow them to intervene in order to safeguard their interests that would otherwise go undefended.

Because the Minority Applicants seek to vindicate fundamental voting rights and to prevent discrimination against those rights on the basis of national origin, they would suggest respectfully that this is the kind of unusual case that should compel the Court to look favorably upon this request for intervention. The Minority Applicants have no other means at their command to otherwise safeguard and defend their voting rights.

Indeed, the Minority Applicants on five different occasions have sought to intervene in the three-judge court below; and each time the court rebuffed them, the most recent occasion being by order of February 25, 1992, which rejected their third, fourth, and fifth applications for intervention. The first two times, the lower court denied their intervention attempts before the December 10, 1991 preliminary injunction hearing.

The Minority Applicants subsequently have sought review of that order by filing their sixth application to intervene on March 13, 1992, which addresses in detail the issues relied upon by the three-judge panel in rejecting applications two through five. To this date, the lower court has not acted on that motion, despite a subsequent request on April 13 from the Minority Applicants that it do so. See Appendix Attachment 1 to this motion. The Minority Intervenors thus have done all that they can to intervene below but

have faced repeated rejection.

Nevertheless, even were the lower court to deny intervention again, the Minority Applicants would only be able to appeal that denial to this Court and still would be unable otherwise to bring forward the question of the legal inadequacy of the judgment entered on December 24, 1991, and supplemented on January 10, 1992,[1] which derogated very significant state constitutional guarantees that are more protective of their voting rights than accorded by the December 24 and January 10 orders. See, e.g., United Auto Workers v. Scofield, 382 U.S. 205, 209-10 (1965); Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137 (1944); Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Brotherhood of Railroad Trainmen v. Baltimore & R. Co., 331 U.S. 519 (1947); Cascade Natural Gas Corp. v. El Paso Gas Co., 386 U.S. 129 (1967); Trbovich v. United Mine Workers, 404 U.S. 528 (1972); NAACP v. New York, 413 U.S. 345, 364-69 (1973).

Further, since the Minority Applicants seek a modification of the temporary election decrees of December 24 and January 10 at issue before this Court, in order to supplant them with the legislatively-adopted election plan more protective of minority voting rights, as decreed by a Texas state district court on January 13, 1992 in Guadalupe Mena, et al. v. Ann Richards, et al., No. C-454-91-F, in the 332nd Judicial District for Hidalgo County, Texas

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[1] It should be noted that neither the December 24 order nor the January 10 order was unanimous. The Circuit Judge dissented both times on grounds of federalism.

Further, although the lower court made fact findings in its January 10 order, no evidentiary hearing whatever was ever conducted on the factual matters in that order, especially concerning comparisons of redistricting plans.

(finalizing a series of earlier orders that had been issued by the state court since August 22, 1991), the Court should allow them to intervene.[2] United States v. Terminal Railroad Ass'n, 236 U.S. 194, 199 (1915). See also Labor Board v. Acme Industrial Co., 384 U.S. 925 (1966), 385 U.S. 432 (1967); Eastern-Central Motor Carriers Assoc. v. United States, 321 U.S. 194, 198-99 n.5 (1944).

This appeal presents the configuration of unusual circumstances in which the Court on other occasions has allowed non-parties below to intervene, particularly to defend vital rights not being defended by any party to the appeal. See Banks v. Chicago Grain Trimmers Ass'n, 389 U.S. 813 (1967), 390 U.S. 459 (1968); and Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969). See also Bryant v. Yellen, 447 U.S. 352, 366 (1980); Rogers v. Paul, 382 U.S. 198, 199 (1965).

The Minority Applicants have no alternative other than intervention to bring forward their concerns and seek the protective mantle of this Court.

QUESTIONS SOUGHT TO BE PRESENTED BY MINORITY APPLICANTS

The questions, which are all substantial and which no party yet has presented to this Court and which the Minority Applicants seek to bring before the Court as reasons why it should set aside the December 24 and January 10 orders in this appeal are:

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[2] Because the Terrazas interim order basically incorporated the Mena v. Richards judgement/settlement as to the Texas House of Representatives, the Minority Intervenors direct their attention to the Terrazas Senate plan, which is much less protective of minority rights than the Mena plan (also referred to as "SB-1") inasmuch as the Mena plan eventually was adopted and approved by the Texas Legislature on January 8, 1992.

1. Whether the district court committed clear legal error by making findings and issuing a ruling under Section 2 of the Voting Rights Act without even conducting an evidentiary hearing thereon?

2. Whether, given the principles of federalism and the Fourteenth Amendment, as well as the Congressional intent behind the Voting Rights Act, a three-judge court may use the Voting Rights Act in derogation of relief afforded under state constitutional equal rights guarantees that more adequately protect minority voting rights than the plan promulgated by the three-judge panel?

3. Whether the Anti-Injunction Act permits a federal trial court to enjoin a state court from adjudicating challenges to the state's legislative districts?

4. Whether a federal trail court should defer to a state court where parallel actions are pending in each court challenging a state's legislative districts?

5. Whether the All Writs Act authorizes a federal trial court to enjoin implementation of a final judgment in a previously commenced state court action that redistricts the state legislature in accordance with state constitutional equal rights provisions, consistent with the Voting Rights Act?

CONSTITUTIONAL PROVISIONS INVOLVED

The Tenth Amendment to the United Constitution provides:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall ... deny any person within its jurisdiction the equal protection of the laws.

The Texas Constitution, article I, section 3, provides:

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

The Texas Constitution, article I, section 3a, provides:

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national

origin. The amendment is self-operative.

The Texas Constitution, article I, section 19, provides:

> No citizen of this State shall be deprived of live, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

I. PROCEDURAL HISTORY LEADING TO THE INTERVENTION APPLICATION IN THIS COURT

The Minority Applicants, at five separate times pursuant to Federal Rule of Civil Procedure 24(a) and, alternatively, pursuant to Rule of Civil Procedure 24(b), sought to intervene and participate in this action below.

The Minority Applicants attempted to intervene as Plaintiffs in order to assure the continuing invalidity of HB-150 and SB-31, the original legislative plans redistricting the Texas House and Senate respectively, to insure the implementation of a legislative reapportionment plan that comports with both federal law and the Texas Constitution, and to protect the final state-court judgment on January 13, 1992 and other relief that they won under the Texas Equal Rights Amendment and other provisions of the Texas Constitu-

tion (Tex. Const. art. I, secs. 3, 3a, 19, 29) as plaintiffs in Mena v.Richards.

The Minority Applicants' efforts were all unsuccessful, their last three attempts being rebuffed together on February 25, 1992.

The Minority Applicants' first attempted intervention was for limited purposes, namely, opposing the Texas State Defendants' Motion for Stay of Court Proceedings in Mena. On August 2, 1991, the lower court overruled the State Defendants' application for stay and, in the same order, denied as moot the Minority Applicants' application.

On December 10, 1991, the Minority Applicants filed an amended motion to intervene, seeking to participate in the preliminary injunction hearing.[3] That application set forth the Minority Applicants' interests at stake, including the Mena proceedings that had concluded recently in state court, and the injunctive relief secured in Mena, since the initial intervention application.

Although the Minority Applicants believe that the three-judge court erred in denying their intervention attempts on December 10 and 12, they did not address again that issue. Rather, they sought to participate in the case as plaintiffs after entry of the December 24 preliminary injunction and from that point forward.

On January 2, 1992, the Minority Applicants filed their Third Motion to Intervene, again setting out their interests at stake in

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[3] At the time of the preliminary injunction hearing, the Republican Party plaintiffs had not conducted any discovery whatever; and defendants, only limited discovery. Nevertheless, the Minority Applicants, at the request of the Terrazas plaintiffs, had provided them with over 2,000 pages of documents, depositions, statements of fact, and exhibits from the Mena litigation.

the litigation and further delineating the circumstances presented by on-going proceedings in the state courts and legislature.

On January 8, the legislature, sitting in special session passed a new reapportionment plan which was nearly identical to that arrived at in settlement of, and as a result of, the Mena litigation.[4]

On January 9, the Minority Applicants filed their Fourth Motion to Intervene following the successful intervention of the Appellees here (except for Tom Craddick) in the Mena litigation on January 6, 1992.[5] One should note that Appellees' intervention came after the December 24 Terrazas order.

On January 13, 1992, the new Senate and House reapportionment plans (SB-1 and HB-1) were approved and adopted by Hidalgo County District Judge Mario E. Ramirez, Jr., presiding over the Mena litigation.

On January 15, the Minority Applicants filed their fifth motion to intervene.

On February 25, 1992, the lower court rejected the Minority Applicants' third, fourth, and fifth motions to intervene, the principal reasons being that the motions were not timely and that the interests of the Minority Applicants were adequately represent-

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[4] A more complete chronology of the events surrounding the Mena case, the legislative response thereto, and this litigation is set out in Appendix Attachment 2, excerpted from a report prepared by the House Research Organization for the Texas Legislature.

[5] Immediately thereafter, the Terrazas plaintiffs, after receiving deposition notices from the Minority Applicants, non-suited their intervention and declined to participate further in Mena. The same day they filed their own state court action in Midland County, Texas. Craddick v. Richards, No. 38,899.

ed by existing parties to the litigation.[6]

II. INTERVENTION BY THE MINORITY APPLICANTS IS REQUIRED BY LAW

The Minority Intervenor sought to intervene as plaintiffs under Federal Rule of Civil Procedure 24(a) (intervention as of right) and Rule 24(b) (permissive intervention). In either case, Rule 24 traditionally has received a liberal construction in favor of intervention. Washington State Bldg. & Const. Trades v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982), cert. denied sub nom. Don't Waste Washington Legal Defense Forum v. Washington, 461 U.S. 913 (1983), quoting 7A C. Wright & A. Miller, Federal Practice and Procedure sec. 1904 (1972).

The four-part test for intervention under Rule 24(a)(2) is as follows:

(1) The application for intervention must be timely;

(2) The applicant must have an interest relating to the subject of the action;

(3) The applicant must be so situated that the disposition of the action, as a practical matter, may impair or impede the ability to protect that interest; and,

(4) The applicant's interest must be represented inadequately by existing parties to the suit.

Texas v. United States Dept. of Energy, 754 F.2d 550, 552 (5th Cir. 1985).

A. THE TIMELINESS OF THE MINORITY APPLICANTS' EFFORTS TO INTERVENE

The first fault the lower court laid on the Minority Appli-

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[6] The trial court did not address why it had granted virtually all the other motions to intervene, regardless of when they have been filed, a number of them after the Minority Intervenors filed theirs.

cants' third, fourth, and fifth motions to intervene (filed January 2, 9, and 15, 1992, respectively) was that they were not timely. That arguably may have been the situation as to the second application relating to the December 10 preliminary injunction hearing. However, it assuredly was not true with respect to the three motions in January concerning subsequent activity in the case and the Minority Applicants' participation in the trial on the merits. The Minority Applicants sought to intervene as plaintiffs from that point forward, not retroactively.

Regardless, the Minority Applicants acted expeditiously throughout the litigation below to assert their pivotal interests in matters under consideration by the three-judge court.

For well over a year, the Minority Applicants consistently and vigorously worked to insure that the state legislative redistricting process equitably and fairly protected the voting rights of Mexican Americans in Texas, consistent with the equal rights mandate of the Texas Bill of Rights (Tex. Const. art. I, secs. 3, 3a, 19, 29) and in compliance with the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973 and 1973(c).

When the original 1991 redistricting plans drawn by the state legislature (HB-150 and SB-31) using 1990 census data were enacted over their objections as violative of their rights, the Minority Applicants immediately sought redress in Texas state district court, where they ultimately prevailed.[7]

The Mena victory, which was finally effected on January 13,

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[7] This Terrazas action below was filed on May 22, 1991, three months after the Minority Intervenors first filed Mena v. Richards.

1992, protected electoral strength for Mexican Americans in Texas. As soon as it became clear to the Minority Applicants that their state court victory was threatened by a collateral proceeding before the three-judge court, they promptly sought intervention to safeguard these rights.[8]

"Timeliness is to be determined from all the circumstances. And it is to be determined by the Court in the exercise of its sound discretion." NAACP v New York, 413 U.S. 345, 366 (1973).

In reviewing "all the circumstances" as they relate to the timeliness of a motion to intervene, the point to which the suit has progressed is a relevant factor. NAACP, 413 U.S. at 365-66. The Minority Applicants' entrance into the case would have caused no repetition of effort. Nor would it have occasioned disruption of any trial schedule adopted by the three-judge panel because the court, to this date, has adopted none.

There was no warning that the Minority Applicants should attempt to intervene earlier than they did. Following denial of the stay application on August 2, 1991, the action below remained dormant as all parties became involved in the state district court cases of Mena and its related counterpart, Quiroz v. Richards, No. C-4395-91-F (332nd Judicial District of Texas, Hidalgo County).

Indeed, the August 2 order, refusing to interfere with the

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[8] The Mena Minority Citizens did not have a final state court judgment to protect in this Court until January 13, 1992, which is when they sought to intervene (January 2, 9, and 15), especially after it became clear on December 24, 1991 that the lower court would not defer to Texas judicial and legislative prerogatives on this question. They did win a temporary injunction on December 9, 1991 in Mena as to redistricting the Texas House and thus sought to intervene in the lower court the next day, a motion they again unsuccessfully renewed orally two days later.

Mena state court proceedings, specifically noted (p.3) that all the claims brought forward rested exclusively on alleged violations of Texas law. Similarly, the August order observed that none of the Terrazas plaintiffs sought to interfere with the progress of the Mena litigation (p.2).

Given that order and the posture of the case, there was no reason to assume that the Mena litigation would be placed at risk by the Terrazas plaintiffs. Indeed, a fair reading of the August 2 order is to the contrary, that the state proceedings would move forward unimpeded by federal intervention.

During this time, the parties were all involved in modifying the previously-passed legislative plans in response to the Mena lawsuit, which was finally settled on December 9, 1991 as to the Texas House. The very next day, the Mena Intervenors, now having a protectable interest, filed their amended (second) motion to intervene in order to safeguard the full voting rights for Mexican Americans in Texas. It was only at this point that the Minority Applicants were able to determine what interests were specifically at stake and which position they would have to take to safeguard their interests.

Courts have recognized the propriety of waiting to actually intervene until the nature of the interest at stake is clear. See, e.g., Jansen v. City of Cincinnati, 904 F.2d 336, 341 (6th Cir. 1990).

Further, the lower court gave rather short notice of the setting for the December 10 hearing. The notice, issued on November 25, 1991, immediately after Thanksgiving, set the hearing

two weeks later. No notice was given to the Minority Applicants.

Thus, the Minority Applicants acted with dispatch as soon as it became apparent they had an interest in the case. Nor can it be said the parties in this litigation were unaware of the Minority Applicants' interest and position on the various redistricting schemes. The Minority Applicants all along were central figures in challenging the 1991 redistricting of the Texas legislature. Indeed, the parties in the case were all intimately involved in the Mena proceedings: the Texas Defendants, as adverse parties; and the Appellees here, first as in-court observers, then as formally admitted party intervenors in Mena.

The Minority Applicants' application in this Court is timely; and they meet all the prerequisites for intervention as of right.

B. LACK OF PREJUDICE BY THE MINORITY APPLICANTS' INTERVENTION

Another factor to be considered with respect to timeliness is resulting prejudice to the original parties. Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1970).

With respect to prejudice to the parties in this case, there is none. There was not even a suggestion in the record that any party opposed the Minority Applicants' last three applications for intervention; and none argued that applications were not timely or that they were prejudicial thereby.[9]

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[9] The Mena Minority Citizens, as amici curiae, submitted extensive documentation at the December 10 hearing regarding the Mena House and Senate plans that they had secured, at least on a temporary basis, as of the time of the hearing. Indeed, those plans are close to those ultimately adopted by the Texas Legislature and approved by the state court on January 13, 1992 in Mena.

Thus, the plans proffered by the Mena Citizens were long before the court; and no party could claim prejudice because of

Indeed, given that the lower court's December 24 order indicated that trial would not occur until after the November 1992 elections, it is difficult to imagine how any party would be prejudiced by the Minority Applicants' entry into the litigation.

Similarly, the Minority Applicants' application in this Court does not prejudice any party to this appeal. Further, on April 13, 1992, counsel for the Minority Applicants sent a letter to all counsel involved in the Terrazas litigation, indicating their intent to seek intervention in this Court and inquiring as to whether any party opposed the intervention. To date, none have replied negatively. Three intervenors have replied positively.

C. THE MINORITY APPLICANTS HAVE A COMPELLING INTEREST IN THE SUBJECT MATTER OF THE LITIGATION WHICH WOULD BE IMPAIRED WITHOUT THEIR PARTICIPATION

The same reasons that favor the Minority Applicants' participation in the proceedings below favor their intervention in this appeal.

The purpose for which the intervention is sought should also be considered in evaluating the totality of the circumstances to determine the timeliness of an application. Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989). Here, the centrality of the interest asserted weighs in favor of intervention.

Fairly stated, no party to this litigation has a more com-

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that fact. Further, by the time of the preliminary injunction hearing the Minority Applicants had voluntarily provided over 2,000 documents, depositions, statements of fact, and exhibits to the Terrazas Appellees at their request.

What remained for the Mena Citizens to do was prove as an evidentiary matter that their plans are more protective of minority rights than the Terrazas interim plan. That they are more protective is shown by the comparisons drawn by the House Research Organization (included here as Appendix Attachment 9).

pelling interest in the subject matter of this case than the Minority Applicants, who are representative of Texas Mexican Americans whose voting rights are intended to be protected by the Texas Constitution and Voting Rights Act, 42 U.S.C. 1973b(f)(2). They have been the engine behind the entire effort to insure that redistricting lines are drawn in compliance with Texas constitutional law.

The Minority Applicants originally filed suit in state district court over the plans for the Texas House and Senate. After lengthy and costly litigation, they were able to secure a settlement with the Texas Appellants. This settlement was subsequently adopted by the legislature and ratified by Judge Ramirez; this plan is at issue in this appeal.

As parties to the state court settlement, and as intended beneficiaries of the Voting Rights Act, the Minority Applicants clearly have a substantial interest in this cause, separate and distinct from that of all the other parties.[10]

It is obvious that their interests could be impaired by decisions of the three-judge court and by this Court. Each decision has, and will continue to have, a distinct impact on their voting rights guaranteed under state and federal law. The Minority Applicants must have the opportunity to participate in the proceedings out of which any injunctive orders will be generated.

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[10] It should also be noted that Judge Ramirez found on January 13, 1992, that the lower court's December 24 order, even if it met the measure of federal requirements, fell short of the Texas Bill of Rights mandate, that is, it was not protective of minority voting rights to the extent demanded by the Texas Constitution. See Appendix Attachment 5 (Further and Supplemental Findings of Fact and Conclusions of Law), 11, 12-23 (paras. 34, 40-45, 47-65).

Perhaps one of the strongest reasons favoring the Minority Applicants' request is that on January 14, 1992, the court below issued a temporary restraining order and then a preliminary injunction against them, non-parties in the Terrazas litigation, prohibiting them from doing anything further in Mena or any other litigation in any court, current or future. See Appendix Attachment 8.

That order precludes Texas courts from construing and implementing the two state equal rights provisions (Tex. Const. art. I, §3, 3a) that this Court and Texas courts have recognized as more protective than the Fourteenth Amendment. See In re McLean, 725 S.W.2d 696 (Tex. 1987); and Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 (1982); Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985).

Certainly, with such extraordinary injunctive orders issued against them, the Minority Applicants should be entitled to intervene, not only to protect themselves from possible sanctions (which Appellees already have invoked repeatedly in Terrazas[11]) but also to protect the subject matter to which the injunctive orders pertain. Due process demands no less.

D. NO PARTY TO THIS LITIGATION ADEQUATELY REPRESENTS THE MINORITY APPLICANTS' INTERESTS

Here, too, the same reasons that favored the Minority Applicants' participation in the proceedings below support their intervention in this appeal.

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[11] E.g., Motion to Enforce Preliminary Injunction, Suggestion for Sanctions Against James C. Harrington and Judith Sanders-Castro (April 4, 1992); Plaintiffs' Motion for Sanctions for Violations of Federal Rule of Civil Procedure 11 (Jan. 31, 1992); Motion for Protective Order and for Sanctions Against Judith Sanders-Castro (Jan. 24, 1992); Motion to Enforce Temporary Restraining Order and Suggestion of Contempt (Jan. 21, 1992).

Once intervention applicants demonstrate that another party's representation of their interests may be inadequate, the burden of proof on this issue shifts to those resisting intervention.[12] Securities & Exchange Comm'n. v. Dresser Indus., Inc., 628 F.2d 1368, 1390 (D.C. Cir. 1980), cert. denied, 449 U.S. 993 (1980). See also Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967). Further, the burden on the intervenor applicants to make the required showing should be treated as minimal. Trbovich, 404 U.S. at 538 n.10.

No party in this case can be said to adequately represent the interest of the Minority Applicants. With respect to the Texas Appellants, their inadequacy of representation is most clearly demonstrated by State's unhappy historical record of adopting and promoting election systems proven to be detrimental to Mexican American voters,[13] including the plans invalidated by Mena.

In addition, Texas Appellants have been implacable foes of the Minority Applicants in the lengthy and bitter battle in state court over the 1991 redistricting plans. The settlement reached between the parties under pressure of litigation cannot transform magically

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[12] Again, the Minority Intervenors would observe that none of the parties in this case filed papers opposing their third, fourth, or fifth intervention attempts in Terrazas below. And none oppose their efforts here.

[13] See, e.g., White v. Regester, 412 U.S. 755 (1973): Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc); Beare v. Smith, 321 F.Supp 1100, 1103 (S.D. Tex. 1971), aff'd sub nom. Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974); Graves v. Barnes, 378 F. Supp 640, 643 (W.D. Tex. 1974) (three-judge), aff'd in relevant part sub nom. White v. Regester, 412 U.S. 755 (1973); Cisneros v. Corpus Christi I.S.D., 324 F.Supp 599 (S.D. Tex. 1970); Garza v. Smith, 320 F.Supp 131 (W.D. Tex. 1970); United States v. Texas, 252 F.Supp 234 (W.D. Tex. 1966); Montejano, Anglos and Mexicans in the Making of Texas, 1836-1986 144 (1987); Hine, Black Victory: The Rise and Fall of the White Primary in Texas 27-28 (1979).

Appellants overnight into guarantors of the minority voting rights.

Further, the courts recognize the incongruity of depending on one's adversary for protection of contested rights as the anomaly it would be: "The [proposed intervenor] cannot be required to look for adequate representation to one who is his opponent ..." Jansen v. City of Cincinnati, 904 F.2d 336, 343 (6th Cir. 1990) quoting 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, sec. 1909, at 321-23 (1986).

The Minority Applicants have different interests from the Texas Appellants in this litigation. Their interests in securing full voting rights for Mexican Americans is distinct from the State's interest in defending the particular plan drawn by the legislature, especially one drawn to serve the legislators' own interests rather than to protect minority voting rights.

As the attached chronology from the House Research Organization demonstrates (Appendix Attachment 2), the Texas Appellants fought the Minority Applicants every step of the way, from early in the legislative process, through the process of gubernatorial inaction, and all the way through the state court litigation.[14]

Only when the writing was on the wall in early December did the Texas Appellants finally enter into negotiations.

Further evidence of the Texas Appellants' hostility toward the Mena judgment, and lack of ability to protect the Mena interests,

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[14] Indeed, the Texas Defendants sought to block the temporary injunction won by the Minority Intervenors in Mena on August 22, 1991, by a direct appeal to the Texas Supreme Court. Although eventually unsuccessful, they effectively tied up the Mena litigation for nearly eight weeks, which, in turn, created the timetable justification upon which the lower court relied for its interim order.

is shown by the fact that, on February 5, 1992, they appealed the Mena judgment in its entirety to the Corpus Christi Court of Appeals (see Appendix Attachment 10). This, even though they asked the trial court to enter the judgment on January 13, 1992 which incorporated legislative action from the special session. This kind of inconsistency and perfidy, in which the Texas Appellants back away, and appeal, from a negotiated settlement shows that the Minority Applicants cannot afford to rely on the Texas Appellants to protect their interests.

The Texas Appellants cannot represent the Minority Applicants while in fact they are attacking the very judgment that the Applicants seek to protect.

Another indisputable example of the Appellants' lack of interest in minority voting rights is their failure, in this appeal, to raise fatal flaws in the district court's order adopting an interim plan and rejecting SB-1. The district court action on SB-1 was clear legal error and against the great weight of authority and should have been raised in the State's appeal. The State of Texas fails in its responsibility to raise this issue except in the limited context of Section 5 of the Voting Rights Act.

The Texas Appellants may have an interest in striving to protect their own legislatively-determined plan; but, as the history of Mena demonstrates, that interest quite often has been antithetical to the Minority Applicants. And will continue to be so in the future.

For example, if the Texas Appellants decide to enter into a settlement or make a strategic decision about whether to appeal or

not, the Minority Applicants who won the redistricting plan under attack by the three-judge court would have no party in the litigation to protect their interests. This, ironically, is the very position that the Terrazas appellees took in their mandamus action in the Texas Supreme Court, and upon which they prevailed. Terrazas v. Ramirez, 35 Tex.S.Ct.J. 256 (Dec. 17, 1991). Surely, it cannot be the rule of equity that the Minority Applicants may not settle Mena in state court without the participation of the Terrazas appellees, but the Terrazas parties can settle without the participation of the Minority Applicants.

Further, in both attempts before this Court to stay the lower court's interim election plan, the Texas Appellants did not rely upon any of the evidence before, or judgment of, the Mena trial court and declined to show that the Mena judgment was superior to the Terrazas plan and thus more fully implemented the state constitutional mandate and Congressional purpose with respect to the Voting Rights Act. Nor did they argue, as the Minority Applicants attempted to do in pleadings struck by the lower court on February 25, 1992, that the December 24 order actually was a regression in minority voting rights when compared to the Mena judgment and subsequent the legislative plan (SB-1).[15] In the

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[15] Indeed, the results of the run-off election in the Democratic primary on April 14, 1992, demonstrate the inadequacy of the Terrazas plan in contrast with the Mena plan. In the run-off election, Roman Martinez, a Mexican American candidate, was defeated by John Whitmire, an incumbent Anglo candidate, in Harris County.

Under the Mena plan, the Martinez/Whitmire contest would have taken place in District 6, in which the Hispanic population is 62.6% and the Hispanic Voting Age population is 57.1% Hispanic and which has a 31.6% Hispanic registered voting population (which, rather importantly, indicates a higher-than-usual Hispanic voter turnout).

view of the Minority Applicants, the Appellants' endeavors undermined the integrity of their judgment.[16]

Jansen, supra, supports this position. There, a group of black employees who filed suit against the city over discriminatory employment practices entered into a consent decree with the city. These employees sought and were denied intervention by the district court in a subsequent action challenging the consent decree brought by white employees. The court of appeals reversed, citing the difference in interest and the adverse history between the parties.

Trbovich, supra, also supports the notion that an intervenor seeking to protect a specific interest should be granted intervenor status when the government agency party has broader and competing interests to serve. Trbovich sought to intervene in an action

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Under the Terrazas plan, the Martinez/Whitmire contest took place in District 15, which has a smaller percentage of Hispanic population (57.1%) and Hispanic voting age population (51.5%) and Hispanic registered voters (26.0%) (which indicates a lower turnout that than District 6).

Mena District 6 has about 2,300 more Hispanic registered voters than Terrazas District 15 and, presumably, about that many less non-minority voters.

Martinez lost the run-off by 1,600 votes. Even more telling, however, is that he only missed winning the primary outright in March by 400 votes. He had 49% of the vote; and Whitmire, 46%.

Thus, the data clearly indicate that, had Martinez run from Mena District 6 rather than Terrazas District 15, he probably would have won the election as the choice of the minority community. This election result validates the interest of the Minority Applicants in preserving the Mena judgment (and SB-1).

[16] This tact is further exemplified by the representation to the court by the Texas Defendants in their January 9, 1992 Response to Emergency Application for Temporary Stay and for Definite Stay of State Court Proceedings (p.2) that they "... are not trying to convince the Court that they enjoy the state court action; law aside, an injunction from this Court might provide blessed relief from the state action" (emphasis added). These are hardly the words of parties on whom the Mena Citizens ought to be required to depend to represent rights as fundamental as the right to vote and to be free from the denial of equal protection.

brought by the Secretary of Labor under Sec. 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. sec. 482(b) to set aside an election of officers of the United Mine Workers. In reviewing the district court's denial of intervention, the Court reversed, specifically resting its decision on the competing interests the Secretary of Labor had to serve. Trbovich, 404 U.S. at 538-39.

This principle was affirmed in Smuck v. Hobson, 408 F.2d 175 (D.C. Cir 1969), in which a group of parents sought to intervene in an appeal when the Board of Education, which represented their interests below, chose not to appeal. In allowing the intervention, the court noted that the possibility that the narrow interests of the intervenor applicant may be different from those of the Board of Education, which is buffeted by conflicting public demands. Id. at 181.

Similarly in this case, the actual and potential conflicts between the Texas Appellants and the Minority Applicants preclude adequate representation of their interests and overcome any presumption of adequate government representation of the private parties' interest.

Nor is Appellant Slagle a party who will protect the Minority Applicants' interests in this litigation. Mr. Slagle's interests lie in protecting the Democratic Party, which, in the contours of this case, means protecting the incumbency interests of Democratic Texas legislators (see December 24, 1991 Summary Opinion and Judgment 24, Appellants' Appendix 48a). After all, it was the incumbent Democrats who passed the original legislative plan that

has since been invalidated by state and federal forums as violative of minority voting rights. The history of this and the Mena litigation, and the concurrent legislative negotiations, amply demonstrate that quite often the interests of incumbent Democrats are antithetical to those of the Minority Applicants.

With respect to Appellees in this case, they too have a significant conflict in representing the Minority Applicants' concerns. The driving force of Appellees' participation is to secure better legislative representation for the Republican Party of Texas. As a vehicle to get to, and remain in, court, Appellees purportedly have brought claims on behalf of minority voters. The interests of the two groups are dissimilar in many respects, as evidenced by positions taken by Appellees in this litigation with respect to the plans offered by the Minority Applicants.

For example, the Appellees bitterly fought the relief the Minority Applicants had won in state court (Mena and Quiroz). Even though the Minority Applicants ultimately had settled the Senate redistricting issues on October 7, 1991, the Appellees filed a mandamus action in the Texas Supreme Court which then stayed implementation of the negotiated Senate reapportionment plan.[17]

Further, Appellees submitted proposed redistricting plans to the lower court, which, in terms of protecting minority rights were substantially inferior to the ones adopted by the court below or

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[17] It is telling that Appellees waited to file the mandamus action until November 25, 1991, the day the Mena trial began as to the House plan (HB-150).

won in Mena.[18]

Likewise, unless the Minority Applicants are allowed to intervene, they may end up in the situation in which Appellees decide to settle (as generally happens in Texas reapportionment cases), with no input from the Minority Applicants, or simply decline to move ahead with the litigation -- both of which events would severely prejudice the Minority Applicants.

The Minority Applicants have met their burden of showing a serious possibility that their interests may not be adequately represented. "The burden [is then] on those opposing intervention to show the adequacy of the existing representation," Nuesse, 385 F.2d at 702. No such showing has been made by the parties.

The Minority Applicants have made a timely petition for intervention and have demonstrated a significant legal interest in the subject matter of this appeal. Disposition of this case in their absence would impair their interests, which no other party adequately represents. Intervention is proper under Rule 24 (a)(2).

E. ALTERNATIVELY, INTERVENTION SHOULD BE ALLOWED BECAUSE THE MINORITY APPLICANTS AND OTHER PARTIES PRESENT COMMON QUESTIONS AND THERE WILL BE NO UNDUE DELAY OR PREJUDICE TO EXISTING PARTIES

Even if they are denied intervention of right, the Minority Applicants still should be granted permissive intervention. Fed. R. Civ. P. 24(b)(2) sets forth a single criterion for permissive intervention -- a common question of law or fact. The rule further

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[18] The lower court also noted in its December 24 Summary Opinion and Judgment (Appellants' Appendix 34a) that Appellees had developed less than a complete record at the December hearing -- hardly the harbinger of adequate representation of the Minority Intervenors' interests.

specifies that, "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id.

This case clearly involves common questions of fact and law between the Minority Applicants and the other parties. The issue here is whether the redistricting plans currently in effect for Texas legislative elections, resulting from the Mena litigation concerning minority voting rights, deny or abridge the right to vote on account of race and color or in contravention of 42 U.S.C. Sec. 1973b(f)(2). The Minority Applicants are members of an ethnic and a language minority group whose rights are protected under 42 U.S.C. Sec. 1973b(f)(2).

Further, there has been no showing that intervention will delay the litigation or prejudice the rights of the parties, which is a primary consideration in the exercise of a court's discretion. Davis v. Board of School Comm'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); United States Postal Service v. Brennan, 579 F.2d 188 (2nd Cir. 1978).

While discretion in considering application of permissive intervention is broad, it is not limitless. Every factor to be considered in connection with an application for permissive intervention weighs heavily in favor of allowing intervention by the Minority Applicants.

In view of the fact that no trial date has been set, and the court below has indicated that the trial will not occur until after the November elections (Appellant's Appendix 34a), the Minority Applicants certainly have sought to intervene in a timely fashion.

In fact, the lower court allowed the intervention of Plaintiffs/Intervenors Stokes and Estrada on October 21, 1991, less than eight weeks before the December 10 hearing. Stokes and Estrada intervened much closer to the December 10 preliminary injunction hearing than the period that will certainly transpire before trial occurs, at least seven months away, if not more.

Nor are any of the current parties or the Court inconvenienced or prejudiced by allowing intervention at this juncture. This case has focused on the merits of the legislative redistricting plan won by the Minority Applicants and whether it or the lower court's plan (or a variant) is eventually adopted.

Given that the issue which the Minority Applicants bring forth is whether their plan should be entitled to the dignity accorded by principles of federalism, especially to a plan more protective of minority rights under the Texas Constitution and federal law than the Terrazas plan, that matter is postured already and introduces no heavier burden on the parties and the Court than that which they eventually must undertake in any respect.

F. CONCLUSION

For purposes of Federal Rule of Civil Procedure 24(a), the Minority Applicants have vital and indisputable interests relating to the Mena judgment that Appellees seek to avoid and they are so situated that the disposition of this matter, as a practical matter, will impair and impede their ability to protect those interests. Their interests are not now adequately protected or represented by the existing parties to this appeal.

For purposes of Rule of Civil Procedure 24(b), the interven-

tion of the Minority Applicants would not at all unduly delay or prejudice the adjudication of rights of the original parties.

III. THE THREE-JUDGE COURT WRONGLY USED THE VOTING RIGHTS ACT IN DEROGATION OF RELIEF AFFORDED UNDER STATE CONSTITUTIONAL EQUAL RIGHTS GUARANTEES THAT MORE ADEQUATELY PROTECTED MINORITY VOTING RIGHTS THAN THE PLAN PROMULGATED BY THE THREE-JUDGE PANEL

The lower court wrongly used the Voting Rights Act in derogation of relief afforded under state constitutional equal rights guarantees (Tex. Const. art. I, secs. 3, 3a) that more adequately protected minority voting rights than the Terrazas plan.

A survey of the Mena (SB-1) and Terrazas plans shows clearly that the former is more protective of minority voting rights.

SENATE "HISPANIC" REDISTRICTING COMPARISONS

MENA PLAN (SB-1)			TERRAZAS PLAN		
District	H-VAP[19]	H-REG[20]	District	H-VAP	H-REG
6 (Harris)	57.1%	31.6%	15	51.5%	26.0%
19 (Bexar)	58.2%	50.1%	24	54.2%	48.0%
20 (Nueces)	57.1%	50.5%	20	57.9%	50.9%
21 (Webb)	59.0%	52.6%	21	58.7%	50.0%
26 (Bexar)	59.7%	51.1%	19	56.3%	48.6%
27 (Hidalgo)	78.6%	66.9%	27(Cameron)	76.9%	64.3%
29 (El Paso)	67.3%	49.9%	29	67.1%	49.8%

SENATE "AFRICAN AMERICAN" DISTRICT COMPARISONS

MENA PLAN (SB-1)			TERRAZAS PLAN		
District	B-VAP[21]	B/H-VAP[22]	District	B-VAP	B/H-VAP
13 (Harris)	50.3%	62.4%	13	57.2%	71.2%
23 (Dallas)	46.3%	68.9%	23	46.0%	68.9%

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[19] Hispanic voting age population.

[20] Hispanic registered voters.

[21] Black (African American) voting age population.

[22] Combined Black and Hispanic voting age population.

SENATE "IMPACT"[23] DISTRICT COMPARISONS

MENA PLAN (SB-1)		TERRAZAS PLAN	
District	B/H-VAP	District	B/H-VAP
12 (Dallas)	32.1%	12	48.5%
15 (Harris)	41.6%	6	28.8%

Thus, the trial court erred in supplanting the Mena plan (SB-1) with its own and, in so doing, violated well-settled principles of federalism as discussed in the following sections.

IV. THE DISTRICT COURT MADE WHOLLY ERRONEOUS FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS WITHOUT EVEN CONDUCTING AN EVIDENTIARY HEARING THEREON

This motion to intervene is appropriate since Intervenors have an unique interest in this litigation. The State of Texas seeks to protect its own legislation. The Terrazas appellees seek to protect partisan gains achieved from the trial court. Only the Minority Applicants seek, exclusively, to protect minority voting interests. The Minority Applicants secured an important victory in Texas state courts, significantly enhancing minority voter potential for the Texas Senate elections. Yet, the trial court undermined these achievements while denying the Minority Applicants an opportunity to participate.

Moreover, the State of Texas does not and cannot adequately protect the minority communities' interest in these proceedings. A glaring example of the State's lack of interest in minority voting rights is its failure in this appeal to raise fatal flaws in the district court's order adopting an interim plan and rejecting

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[23] Although not yet defined by the Supreme Court, for purposes of comparison, we use 40%+ minority to define an "impact district."

SB-1. The trial court erroneously and without justification found SB-1 "fails to satisfy the Section 2 requirements of the voting rights act." Order and Judgment, January 10, 1992, Appellants' Appendix 13a.

The district court action on SB-1 was clear legal error and against the great weight of authority and should have been raised in the State's appeal. Moreover, the trial court erred by its failure to follow clear and unambiguous precedent, establishing the narrow grounds for adoption of an interim court plan.

Again, the State of Texas failed in its responsibility to raise this issue except in the limited context of Section 5 of the Voting Rights Act. The district court, however, acted contrary to established law whether it was acting exclusively as a Section 5 court or a court reviewing state redistricting plans pursuant to the Fourteenth Amendment and Section 2 of the Voting Rights Act. The Minority Applicants seek to raise these critical errors in the lower court's orders through this intervention.

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING SB-1 (MENA) FAILED TO MEET THE REQUIREMENTS OF SECTION 2

This case involves the implementation of an interim court-ordered redistricting plan over a legislatively-enacted redistricting plan where no trial or hearing challenging the legislative plan has been held and where the legislative plan had been reviewed and precleared pursuant to Section 5 of the Voting Rights Act. 42 U.S.C. §1973c. The trial court gratuitously held that the legislatively-enacted plan (SB-1) failed to meet the requirements of VRA Section 2. Order and Judgment (January 10, 1992), Appellants' Appendix 13a. Yet, the district court failed to inquire into the

facts that would support such a finding and failed to comport its findings with the legal requirements for an analysis of minority vote dilution detailed in Thornburg v. Gingles, 478 U.S. 30 (1986).

The clearly-erroneous test of Rule 52(a) normally is the appropriate standard for appellate review of a finding of vote dilution. Rogers v. Lodge, 458 U.S. 613, 622-27 (1982). However, Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a "mixed" finding of law and fact, or a finding of fact predicated on a misunderstanding of the governing rule of law. Bose Corp. v. Consumer Union of U.S., Inc., 466 U.S. 485, 501 (1984). Here, the trial court failed to inquire into any of the factual requisites delineated by Thornburg to determine a finding of minority vote dilution.

Thornburg established a three-pronged test for evaluating claims of minority vote dilution. 478 U.S. at 50-51. First, the minority group making the claim of vote dilution must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.[24] Id. at 50. Second, the minority group must be able to show it is politically cohesive. Id. at 51. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Id. at 51. Examination of racial bloc voting is a key element of a vote dilution claim. Id. at 55. The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain

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[24] In Terrazas, the Republican Party of Texas is purporting to make its claims under Section 2 on behalf of African American and Mexican American voters of Texas.

whether minority group members constitute a politically cohesive unit and to determine whether Anglos vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Id. at 56. Finally, in a single-member district context, it is important to examine the impact of the actual boundaries in cohesive minority community neighborhoods. Id. at 46 n.11. Therefore, a court should examine whether districts in a districting plan have fragmented or packed cohesive minority populations. Id.

These clear, unambiguous legal standards for reviewing a voter dilution claim were ignored by the district court. Rather than examine SB-1 for the impact of racially polarized voting on its districts or to determine if Anglo bloc voting would frustrate minority electoral potential in SB-1 minority districts, or to examine SB-1 for fragmentation or packing, the lower court chose to reject SB-1 because it came to the erroneous "conclusion [that] having reviewed the Senate plan...[this court] sees no indication that the Senate is attempting to devise a plan that would enhance minority voting strength over that provided in this Court's interim plan." Order and Judgment, January 10, 1992, Appellants' Appendix 5a. The court made this finding without an evidentiary hearing.

In its analysis, the trial court compared Mena/SB-1 minority districts to the Terrazas interim minority districts. The major difference the court found was that, although both plans provided nine minority districts, only the district court's plan provided an impact minority district. The district stretching from Mexican American neighborhoods in South Dallas through Anglo neighborhoods

to mixed minority neighborhoods in Fort Worth was District 12.[25] Id. Yet, nothing in the record or in the lower court's order evidences any cohesion between Hispanics in Dallas and African Americans and Hispanics in Fort Worth.[26] Moreover, no analysis of Mena/SB-1 is made to determine whether fragmentation of minorities occurred. The only packing of minority population in Mena/SB-1 intimated by the court was in District 27 where Hispanics comprised 83.1% of the population generally and 78.6% of the voting age population. Id. at p. 6. Yet, the interim plan draws District 27 with 81% Hispanic population and 76.9% Hispanic voting age population ("VAP"). Thus, if District 27 in Mena/SB-1 is packed at 78.6% Hispanic VAP, so it must also be packed at 76.9% Hispanic VAP in the court's interim plan. Id. In describing the various minority districts in each plan, the trial court attempts to justify its preference for its own plan over Mena/SB-1. Where the court plan's minority districts have slightly larger minority populations, the district court characterizes them as "stronger." Id. For instance, the court finds its Districts 20 and 21 with 59.7% Hispanic VAP and 59.4% Hispanic VAP, respectively, are "stronger" than Mena/SB-1

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[25] Although District 12 has a combined minority voting age population of 48.5%, SB-1 has a minority "impact" district in Harris County not contained in the court's interim plan. District 15 in SB-1 has a combined minority voting age population of 41.6%.

[26] Ironically, this same district court in Overton v. City of Austin rejected claims of minority voter cohesion between African Americans and Mexican Americans in Austin where statistical evidence showed Mexican Americans supported Black-preferred candidates at a 73% rate and African Americans supported Mexican American preferred candidates at a 69% rate. See 871 F.2d 529, 536 (5th Cir. 1989). Yet, here, without any evidence of dual minority cohesion, the district court rejected Mena/SB-1 and preferred a combined minority impact district stretching over two distinct counties.

Districts 20 and 21 with 57.9% and 58.2% Hispanic VAP, respectively. Yet, the trial court ignores the fact that, with respect to District 21, Hispanic voter registration is actually higher in Mena/SB-1 (53%) than in the court's interim plan (50%). In fact, the trial court ignores altogether Hispanic registration as a measure of minority voting strength of a district and it is not difficult to understand why. Mena/SB-1 contains 6 majority Hispanic registration districts, the Terrazas plan has only 4[27]:

Mena/SB-1 Plan		Terrazas Interim Plan	
District	% Hispanic Registered Voters	Comparable District	% Hispanic Registered Voters
21	52.6%	21	50.0%
19	50.1%	24	48.0%
26	51.1%	19	48.6%
20	50.5%	20	50.9%
27	66.9%	27	64.3%
29	49.9%	29	49.5%

The superior protections of Mena/SB-1 over the court's plan with respect to minority voter interests is also shown from examining other districts. In Harris County, for example, the Terrazas interim plan reduces the Hispanic voter registration proportion of the new "Hispanic" district by 6%. District 6 in Mena/SB-1 is the new Harris County Hispanic Senate District; it compares to District 15 in the Terrazas plan:

	Mena/SB-1 Dist. 6	Terrazas Plan Dist. 15
% Hispanic population	62.6%	57.1%
% Hispanic VAP	57.1%	51.5%
% Hispanic registered voters	31.6%	26.0%

The court's plan, thus, weakens the so-called Hispanic district in Harris County to the point where an Anglo incumbent has

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[27] District 29 is counted as a 50% Hispanic registered district for both plans.

a greater chance of success, which indeed is what occurred in the March primary and April run-off (see n.15 above). Finally, the District Court admits that both plans contain two "Black districts." Order and Judgment, January 10, 1992, pp. 7-8.

Thus, even if the appropriate measure for review of Mena/SB-1 for compliance with Section 2 was comparison with the Terrazas interim plan, Mena/SB-1 could not have been found to "fail the requirements of Section 2" since it provides greater protection to minority voters than does the interim plan.

Another reason for the district court's rejection of Mena/SB-1 appears not to be minority voter dilution at all, but rather "time-consuming partisanship." Order and Judgment, January 10, 1992, Appellants' Appendix 8a. The lower court improperly rejected the partisan advantage gained in Mena/SB-1 as a basis for using its own plan. Id. Disturbingly, however, the trial court had earlier found that the Republican Plaintiffs had failed to make a partisan gerrymandering case as required by Davis v. Bandemer, 478 U.S. 109 (1986). Summary Opinion and Judgment, December 24, 1991, Appellants' Appendix 34a. Under any circumstance, however, it is clear that the lower court did not review Mena/SB-1 for minority vote dilution pursuant to the appropriate legal standard as articulated in Thornburg, and should not have brushed aside Mena/SB-1 in favor of its own inferior plan. The orders of December 24, 1991 and January 10, 1992 should be reversed.

B. THE LOWER COURT ERRED AS A MATTER OF LAW BY IMPOSING ITS OWN PLAN OVER THE LEGISLATIVELY ENACTED AND APPROVED SB-1

The trial court also erred by ignoring clear legal principles

established to guide courts in substituting their plans for legislatively-enacted redistricting plans. The district court failed to abide by the principle that reapportionment is primarily the duty and responsibility of the state legislature rather than that of a federal court. Reynolds v. Sims, 377 U.S. 533, 587 (1964).

More-over, the trial court ignored the rule that it errs if it overrides state apportionment policy without solid constitutional or equi-table grounds. White v. Weiser, 412 U.S. 783, 796 (1973).

Thus, when fashioning a temporary plan, the district court should not have preempted the legislative task or "intrude[d] upon state policy any more than necessary." Whitcomb v. Chavis, 403 U.S. 124, 160 (1971). The trial court, in fact, chose to proceed with its own plan over one that better protected minority voting interests and was a legislatively enacted plan in order to ensure that primary elections would proceed as scheduled. Yet, a state district court in Hidalgo County, Texas in Mena v. Richards had already cleared the way to ensure that SB-1 could proceed without interrupting the scheduled March primary elections. Final Judgment, January 13, 1992, Appendix Attachment 3. Moreover, the State, through legislation, had made a policy choice that proceeding with SB-1, even if a new primary date was necessary, was preferable than proceeding with the interim court plan.

The lower court chose to proceed with its own plan rather than defer to the legislative plan because the Court plan "enhanced minority voting rights to a greater degree than provided in a Quiroz-

style plan [Mena/SB-1]."[28] However, even were this rationalization true, which it is not, it hardly rises to the level of the "solid constitutional or equitable grounds" necessary to brush aside state reapportionment policy. White v. Weiser, supra.

In the 1980 re-districting process, for example, a three-judge court in Texas refused to reject wholesale the legislative redistricting enactment even though it had failed Section 5 preclearance. Terrazas v. Clements, 537 F.Supp. 514, 540 (N.D. Tex., Dallas Div., 1982), stay denied, 456 U.S. 902 (1982). Instead of making whole-sale changes, the district court, in the 1980 litigation, began with the legislative enactment of the Legislative Redistricting Board plan, and adopted plans for only two counties proposed by minority plaintiffs to enhance minority voting strength and in which the Department of Justice had specifically found objections under Section 5. Id. Here, the trial court not only refused to use Mena/SB-1 as a base, but also ignored the wholesale alteration of the state apportionment policy caused by its own plan. Order and Judgment, January 10, 1992, Appellants' Appendix 13a-15a.

The lower court erred by failing to abide by clearly established principles governing the appropriate circumstance for implementation of court-ordered interim redistricting plans; its orders should be reversed.

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[28] Because Quiroz v. Richards adopted a revised Senate redistricting plan before Mena, "Quiroz" is sometimes used, especially by the lower court, to encompass the Mena litigation. Mena and Quiroz produced, and then ratified, the 1992 revised Senate reapportionment plan (SB-1).

V. ARGUMENT AS TO LEGAL IMPROPRIETY OF TERRAZAS INJUNCTION AGAINST TEXAS STATE COURT ACTION

A. INTRODUCTION

The January 14, 1992, preliminary injunction (Appendix Attachment 8) issued by the Terrazas panel enjoining further activity in the Mena litigation (or any similar litigation, for that matter) effectively transferred from the Texas state courts to a federal court the entire responsibility for reviewing challenges to Texas' legislative districts. That injunction undercuts the federal system of justice, of which the state courts play an essential role. If a federal district court may preempt and enjoin a state court from construing and implementing a state redistricting law, only the federal courts will be left to construe and define state policy on redistricting. This would be true not only of Texas but of all fifty States as well.

Texas was one of the first States to have a state court review its 1991 legislative redistricting plan a process encouraged by Scott v. Germano, 381 U.S. 407 (1965) (per curiam). This reflects a trend begun a decade ago when state courts considered about one-third of nearly 90 challenges to legislative or congressional redistricting plans during the 1980s. See National Conference of State Legislatures, Reapportionment Update (April 1987). If the trend toward state court involvement in redistricting continues in the 1990s' round of redistricting litigation, many more cases will be filed in the state courts, than in federal court. The lower court's preemption and injunction would reverse that legitimate and desirable trend.

B. THE DISTRICT COURT'S PRELIMINARY INJUNCTION OF ALL STATE COURT PROCEEDINGS VIOLATES THE ANTI-INJUNCTION ACT

The Terrazas court did not have authority to preempt and enjoin the state court redistricting action. Its order exceeds the boundaries established by Congress for the country's dual federal and state court systems and intrudes upon the jurisdiction of the Texas and its courts in derogation of rights of the State's minority community.

The sole reason that the panel gave for using the preliminary injunction was that "confusion ... might result with the issuance of state district court orders that conflict or interfere with the orders entered by this Court ...." Preliminary Injunction, Appendix Attachment 8, p.2. This speculative finding was not based on an evidentiary hearing, and the order recited no case authority.

Congress recognized the limits on federal court authority to enjoin state courts when it enacted the Anti-Injunction Act (28 U.S.C. § 2283), which embodies the constitutional requirement of joint sovereignty that includes a federal government and judiciary with limited powers as found in the Tenth Amendment. Gregory v. Ashcroft, 111 S. Ct. 2395, 2399-2402 (1991).

When a reapportionment issue is a state constitutional prerogative, the Tenth Amendment controls; and the state retains responsibility. Sugarman v. Dougall, 413 U.S. 634, 648 (1973). Further, to protect the "Republican Form of Government" guaranteed by the U.S. Constitution (Article IV, § 4) elected state judges should review the apportionment plan passed by the legislature barring any exclusive jurisdiction for the federal court.

The Anti-Injunction Act establishes a general prohibition

against federal court interference with state court proceedings.

The exceptions contained in the Anti-Injunction Act are "narrow and are not [to] be enlarged by loose statutory construction." Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988), quoting Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970). The Act does not convey "a broad general policy for appropriate ad hoc application," but rather is "a clear-cut prohibition qualified only by specifically defined exceptions." Id. at 287, quoting Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 515-16 (1955). If a federal court's power to enjoin a state court action is in doubt, the federal court should not intrude upon the state court's authority. Atlantic Coast Line R.R., 398 U.S. at 297.

The Terrazas court, without citing any authority, concluded that an injunction of the state court redistricting action was necessary because competing judgments might cause "confusion". It recognized that the state court's orders might be inconsistent with its orders and held that such a situation should not continue.[29] Rather than defer to the state court's exercise of concurrent jurisdiction, see Scott v. Germano, 381 U.S. at 409, the federal court concluded it was necessary to enjoin the state court.[30]

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[29] The risk of inconsistent orders existed from the time the federal action was filed in May 1991. On August 2, 1991, the trial court denied a motion to enjoin the state court action. However, the court reversed this position and issued its injunction in the very late stages of the state redistricting litigation without any notice, hearing, or additional briefing.

[30] In enjoining the state court proceeding, the federal court apparently assumed that it had exclusive jurisdiction over challenges under section 2 of the Voting Rights Act, 42 U.S.C. § 1973. This assumption was erroneous, as state courts have concurrent

The "aid of jurisdiction" exception to the Anti-Injunction Act is extremely narrow and applies almost exclusively to in rem proceedings or to cases where a state court action "would interfere with ongoing federal oversight of a case, such as school desegregation orders." 1A pt. 2 J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, Moore's Federal Practice § .209[2] at 2340 (2d ed. 1991). This narrow exception does not apply simply because parallel actions are proceeding in both federal and state courts, even where resolution of the matter by both courts would be inconsistent and unworkable. Atlantic Coast Line R.R., 398 U.S. at 295-96; Phillips v. Chas. Schreiner Bank, 894 F. 2d 127, 132 (5th Cir. 1990); Texas v. United States, 837 F.2d 184 (5th Cir. 1988).

Moreover, a federal court lacks authority to enjoin the state court action even where the state action interferes with the federal action. A federal court "does not have inherent power to ... enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakenly clear." Atlantic Coast Line R.R., 398 U.S. at 294. Instead, the issue should be raised in the state court action and that court should determine the limits of its own jurisdiction. Chick Kam Choo, 486 U.S. at 149-50 (when "a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court").

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jurisdiction over such claims. See Hathorn v. Lovorn, 457 U.S. 255, 269 (1982); see also Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (concurrent state court jurisdiction presumed absent provision by Congress to the contrary or disabling incompatibility).

The Terrazas court exceeded its authority in issuing an injunction against the Texas state court redistricting action. Its order should be reversed.

C. THE DISTRICT COURT'S REFUSAL TO DEFER TO THE STATE COURT ACTION VIOLATES THE DOCTRINE ESTABLISHED IN SCOTT V. GERMANO

The lower court's injunction not only exceeds its authority and violates principles of comity but also contravenes the mandate of Scott v. Germano, which made clear that the exceptional nature of redistricting requires federal courts to defer to state reapportionment efforts, including those undertaken by a state judiciary:

> The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate actions by the States in such cases has been specifically encouraged.

381 U.S. at 409.

Germano states a broad rule of deference to states and state courts in redistricting matters which extends to the circumstances of this case.[31]

In Germano, parallel challenges to the redistricting plans for the Illinois legislature were brought in state and federal court. Before the state court even began to work on a valid redistricting plan, the state defendants asked the federal court to stay its

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[31] It should be noted that the Circuit Judge sitting on the Terrazas panel recognized the federalism concerns at stake when he dissented from the December 24 interim order because he believed that deference should be given to the legislative process and Texas courts to address the reapportionment ills highlighted by the court before the federal panel imposed its own interim plan (Summary Opinion and Judgment 27), citing McDaniel v. Sanchez, 452 U.S. 130, 150 n.30 (1981). Appellants' Appendix 51a.

He restated his dissent in even stronger terms to the panel's supplemental Order and Judgment (10) of January 10, 1992.

proceedings. The federal court refused to defer to the parallel state proceedings, in part because the federal action had been filed before the state action had reached the merits. Germano v. Kerner, 241 F. Supp. 715, 719 (N.D. Ill.), vacated sub nom. Scott v. Germano. On direct appeal, this Court ordered the federal court to stay its hand unless and until it became clear that the state court would be unable to develop a plan before the election. Germano, 381 U.S. at 409-10.[32]

Deference to state redistricting efforts in this case is even more appropriate than the deference required in Germano. The Texas state court had assumed jurisdiction and rendered a final judgment which would have been implemented but for the federal court stay. Despite the federal court's contentions to the contrary, it was clear that the agencies of Texas, including the Supreme Court of Texas, would have been able to approve a redistricting plan in time for the 1992 elections. The state court action, which was filed months before the federal action, proceeded rapidly. The state court completed its substantive work in late November and issued a final redistricting order on January 13, 1992. That judgment would have been reviewed immediately by the Texas Supreme Court, had the state defendants appealed. Tex. Const. art. V, §3-b; Tex. Govt Code §22.001(c) (Vernon 1988). The federal court injunction, how-

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[32] Federal courts repeatedly have recognized the clear abstention requirement set forth in Germano and have deferred to parallel state court redistricting actions. E.g., Bianchi v. Griffing, 393 F.2d 457, 461 (2d Cir. 1968); Badham v. March Fong Eu, 568 F. Supp. 156, 158 (N.D. Cal.), aff'd sub nom. Badham v. United States Dist. Court, 721 F.2d 1170 (9th Cir. 1983); Avens v. Wright, 320 F. Supp. 677, 686 (W.D. Va. 1970); Mahoney v. Burkhardt, 299 F. Supp. 787, 789 (D. N.J. 1969).

ever, disrupted the timely and orderly operation of Texas' judicial system, stopping it in its tracks.

This Court has expressed approval of state court review of legislative redistricting plans:

> We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes.

Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 674 (1964), citing a Kansas Supreme Court redistricting decision as a "commendable example of an exercise of judicial responsibility by a state court." Id. at 674 n.18 (citing Harris v. Shanahan, 192 Kan. 183, 387 P.2d 771 (1963).

The state court must be given an opportunity to formulate and approve valid redistricting plans without interference from the federal courts. See, e.g., 17 A.C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4247, at 127.

No one disputes that redistricting is essentially a legislative function and that the judiciary, both state and federal, should give appropriate deference to the Legislature. What is at issue here, however, is the proper relation between Texas state and federal courts. This Court has emphasized that the federal courts must give the utmost deference to the state courts where redistricting matters are at stake. The trial court has not only refused to defer to the courts of Texas, it has prevented the state court from carrying out the very role this Court has encouraged state courts to undertake. The lower court's order violated the important prin-

ciple established by Scott v. Germano and should be vacated.[33]

D. THE STAY IS NOT AUTHORIZED BY 28 U.S.C. §1651(a)

Nor would the All Writs Act, 28 U.S.C. § 1651(a), apply to this case.

The Act permits a federal court to issue writs to protect its own judgments or its own orders. See, e.g., Pennsylvania Bureau of Correction v. United States Marshals Service., 474 U.S. 34, 40-43 (1985). The purpose and office of the Act is to protect already issued judgments or orders about to be issued. Baker v. Gotz, 415 F. Supp. 1243, 1247 (D. Del.), aff'd, 546 F.2d 415 (3d Cir. 1976). The phrase "in aid of" does not vest or create a general restraining power in the federal courts.

As this Court noted in Kline v. Burke Construction Co., 260 U.S. 226, 230 (1922):

> [A] controversy is not a thing, and a contraversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.

In reversing an injunction granted under the All Writs Act, Kline quoted with approval from Baltimore & Ohio R.R. v. Wabash

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[33] Interestingly, throughout the course of the Mena proceedings the state district court deferred to the state legislature to correct the deficiencies the court found. The Terrazas court made no such deference at all, although Judge Garwood did dissent on that point.

R.R. Co., 119 Fed. 678, 680-81 (7th Cir. 1902), cert. denied, 187 U.S. 650 (1903):

> It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted .... The rule is not only one of comity, to prevent unseemingly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.

260 U.S. at 231.

This is not a case where federal court judgment has been entered and the state court seeks to prevent its enforcement. See, e.g., Travia v. Lomenzo, 381 U.S. 431 (1965). Rather, the state court acquired jurisdiction first, held four evidentiary hearings, a trial, undertook painstaking and detailed review of varied legislative plans, reached judgment, and entered injunctive orders before the lower court acted.[34]

In this case, there was no need for injunctive relief to protect the federal court's jurisdiction. To the extent that the federal court has jurisdiction over the subject matter of state legislative redistricting, it is concurrent with that of the Texas state courts. See Scott v. Germano. Concurrent federal jurisdiction will not disappear based upon any state court order. On the other hand, granting a preliminary injunction against implementa-

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[34] During the course of Mena v. Richards, the Texas Supreme Court also twice reviewed the action.

By contrast, the Terrazas court held only one hearing, and that for a preliminary injunction, which the court set for hearing sua sponte on its own motion without the request of any party.

tion of the state court judgment defeats the very concept of concurrent jurisdiction.

Issuance of a preliminary injunction below was not "agreeable to the uses and principles of law." 28 U.S.C. § 1651(a). Nor to the principles of comity or federalism. It is not agreeable to the principle set forth in Scott v. Germano, 381 U.S. at 409, and not consistent with the concept of concurrent jurisdiction. It would not permit even the Texas Supreme Court to order implementation of the trial court's final judgment.

The Texas state court judgment in Mena does not seek to interfere with or impede the imposition or effectuation of any federal court plan. The "principle of federalism" to which the court below gave no attention would require only that the federal court stay its hand until "the appropriate agencies of the State ... including its Supreme Court, may validly redistrict ...." Scott v. Germano, 381 U.S. at 409. In this case, the temporary injunctive order of the district court should be vacated and the case remanded with instructions that the trial court retain jurisdiction pending immediate action by the Texas appellate courts. See Scranton v. Drew, 379 U.S. 40 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. at 674.

D. CONCLUSION

This preliminary injunction affects not only a state court in Texas, but state courts throughout the country that are undertaking the 1990s round of redistricting. If this preliminary injunction is allowed to stand, it will discourage all state courts from becoming involved in redistricting and throw the entire burden on

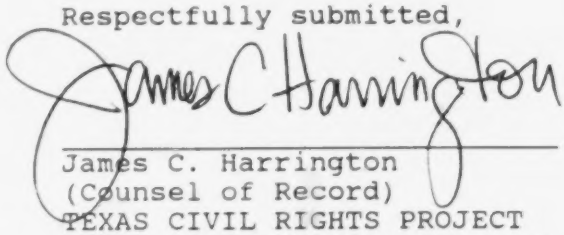
the federal courts. Every appeal of a district court decision will go straight to this Court, bypassing the State's own highest court. This is completely at odds with this Court's oft-repeated concern for the role of state courts in our federal system. The preliminary injunction should be vacated forthwith.

PRAYER FOR RELIEF

THEREFORE, the Minority Intervention Applicants respectfully pray that the Court allow them to intervene in this appeal.

Dated: May 11, 1992.

Respectfully submitted,



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